# Petition

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NO.

IN THE

# Supreme Court of the United States

October Term

ALBERT C. MCCORD

Petitioner,

versus

STATE OF GEORGIA

Respondent.

---

ON WRIT OF CERTIORARI FROM

THE SUPREME COURT OF GEORGIA

---

## PETITION FOR WRIT OF CERTIORARI

William C. Tinsley, II
P.O. Box 776
Douglasville, Georgia 30133
(404) 942-0900

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### QUESTION PRESENTED

The words "any immoral or indecent act" in the Georgia Child Molestation Statute (Ga. Code Ann. §26-2019) are so vague and overbroad that they violate the Due Process of Law guaranteed by the Fifth and Fourteenth Amendment to the Constitution of the United States.

## OPINION BELOW

The Supreme Court of Georgia issued an opinion in this case, a copy of which appears in Appendix A to this Petition at page 10.

## STATEMENT OF GROUNDS UPON WHICH JURISDICTION IS INVOKED

The judgment of the Supreme Court of the State of Georgia was entered on January 7, 1982. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(2).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This case also involves the Fifth Amendment which provides as follows:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual services in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness

against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

This case also involves Georgia Laws 1968, pp. 1249, 1302 (Ga. Code Ann. §26-2019) which provides as follows:

"A person commits child molestation when he does any immoral or indecent act to or in the presence of or with any child under the age of 14 years with the intent to arouse or satisfy the sexual desires of either the child or the person."

## STATEMENT OF THE CASE

The Petitioner was indicted for violation of Georgia Laws 1968, pp. 1249, 1302 (Ga. Code Ann. §26-2019) otherwise known as child molestation and convicted by a jury on February 17, 1981. Prior to trial, the Petitioner filed a Motion to Quash the indictment (R-5) on the grounds that Code Section 26-2019 was so vague, indefinite and overbroad so as to violate the Due Process and Equal Protection Clauses of the Constitution of the State of Georgia and the Federal Constitution as set forth in the 5th and 14th Amendment to the Constitution. The Trial Court heard argument and ruled that the Statute was constitutional. (R-12). At the trial of the case there was a conflict in testimony between the Petitioner and the victim as to the alleged act. The only evidence of the crime was testimony by the victim was as follows:

A. "He stuck his thing between my thing in the middle of my legs."
Q. "What else-did anything come out of his thing?"
A. "Something white."
Q. "What did you do when the white stuff came out?"
A. "He wiped it off" (T-57)

## REASONS FOR GRANTING THE WRIT

The Petitioner is not aware of any decision by a State or Federal Appeals Court as to the exact question presented in the Application.

The present case is unlike *Rose v. Locke,* 423 U.S. 48, 46 L.Ed. 2d 185, 96 S.Ct. 243 which dealt with an attack on the constitutionality of a Tennessee Statute proscribing "crimes against nature." In that case, the Court held that "anyone who cared to do so could certainly determine what particular acts have been considered crimes against nature . . ." 462 L.Ed. 2d at 188. Rather the present case is more in line with the reasoning of the Ninth Circuit Court of Appeals in the case of *Jellum v. Cupp* 475 F. 2d 829 (1973) which considered the meaning of the phrase "unnatural conduct contrary to the course of nature". As the Ninth Circuit Court said:

"There is simply no commonly accepted, definite meaning of the phrase 'unnatural conduct contrary to the course of nature'. Accordingly, we must conclude that the statute, as construed in *Anthony,* supplies a jury (or a judge sitting without a jury) no legally fixed standards under which to determine guilt. Further, we note that the statute does not supply any standard or basis for a trial judge to apply in submitting one case to a jury or refusing to submit another for jury consideration. This same looseness in the statutory language would allow a state prosecutor to use the statute selectively to rid the community of persons subjectively deemed guilty of committing 'abnormal' or 'unnatural' acts.

As the trial judge state in his well-reasoned opinoin: 'The varieties of human sexual behavior are encyclopedic. A beginning inventory, from arson to zooerasty, can be found in R. von Kraft-Ebing, *Psychopathia Sexualis.* If a stuatue allows the district attorney to pick through this catalog and

make a felony of any sex-related act that offends his concept of "normal" behavior, the statute is, of course unconstitutional.'"

In like manner, the Georgia law has the same looseness in the statutory language. What is an "indecent or immoral act" as outlined in Ga. Code Ann. §26-2019? Under Chapter 26-20 of the Criminal Code, the offenses of rape, sodomy, bestiality, seduction, incest, adultery, fornication, public indecency, prositution, statutory rape, masturbation for hire and necrophilia have set definite guidelines as to the prohibited conduct. In each of these, the conduct prohibited refers to either sexual intercourse or an act involving stimulation of the sexual organs of another. If the legislature had meant to limit the prohibited conduct in this section, it would have done so as in the other sections of the chapter. None of the other sections in the chapter define either immoral or indecent acts as being the type of conduct contained in that particular section. Therefore even if the sections are to be construed together there is no clear definition of the prohibited conduct.

Furthermore the Georgia Supreme Court in its opinion said that the term "indecent act" had withstood prior assault in the case of *Scarborough v. State* 231 Ga. 7 200 S.E. 2d 115(1973), yet this was a public drunk case in which the Court held that "the question comes down to whether the Defendant's condition was such as to offend the public decency in this case." The Georgia Supreme Court used the Revised Fourth Edition of *Black's Law Dictionary* for its definition which defines indecent as "Offensive to common propriety; offending against modesty or delicacy; grossly indecorous; unfit to be seen or heard; unbecoming." P. 909.

This definition of "indecent act" and *Black's Law Dictionary* definition of "immoral" emphasize the looseness in

the statutory language which would allow a prosecutor or a judge to selectively enforce the law, rather than follow the set guidelines as contained in the other sections of Chapter 20 of the Georgia Criminal Law.

The Petitioner contends that contrary to the State Supreme Court opinion, the statute is not definite and certain in its meaning so that "men of common intelligence would not differ as to the application of its provision." Especially in light of the circumstantial evidence of the case contained in the testimony of the victim, the ambiguity and vagueness of the statute is clearly seen.

Not only is this statute vague, but it is also overbroad in its applicaiton with the potential to prohibit consitutionally protected conduct. What the community may define as an "immoral act" may be protected speech under the First Amendment. Since the statute is overbroad on its face, it would "license the jury to create its own standard in each case." *Gooding v. Wilson,* 405 U.S. 529, 92, S.Ct. 1103 (1972) citing *Herndon v. Lowery* 301 U.S. 242, 263 57 S.Ct. 732, 741 81 L.Ed. 1066 (1937).

## CONCLUSION

Wherefore, Petitioner prays that a Writ of Certiorari issue from this Honorable Court to review the judgment of the Supreme Court of Georgia in *McCord vs. State of Georgia.* In the event the petition is granted, Petitioner prays that the judgment of the Court below be reversed.

RESPECTFULLY SUBMITTED

TINSLEY & EMERSON

BY: _____
WILLIAM C. TINSLEY, II

P.O. Box 776
Douglasville, Georgia 30133
942-0900

## CERTIFICATE OF SERVICE

I, WILLIAM C. TINSLEY, II, counsel for Petitioner, do hereby certify that I have this date served a copy of the foregoing Petition for Certiorari upon Mr. W.A. Foster, District Attorney, Douglas County Courthouse, Douglasville, Georgia 30134 and Michael J. Bowers, Attorney General, 132 Judicial Building, 2 Capitol Square, Atlanta, Georgia 30334 by depositing the same in the United States Mail with adequate postage thereon.

This _____ day of March, 1982.

_____
WILLIAM C. TINSLEY, II
ATTORNEY FOR PETITIONER

# Appendix

IN THE SUPREME COURT OF GEORGIA

DECIDED: January 7, 1982

38042. ALBERT C. MCCORD V. THE STATE

WELTNER, Justice

Albert C. McCord was convicted by a jury of the offense of child molestation and sentenced to the penitentiary. He appeals to this Court, challenging the constitutionality of Code Ann. §26-2019, and setting forth other enumerations of error.

The statue in question provides: "A person commits child molestation when he does any immoral or indecent act to or in the presence of or with any child under the age of 14 years with the intent to arouse or satisfy the sexual desires of either the child or the person." Ga. L. 1968, pp. 1249, 1302; Code Ann. §26-2019. McCord contends that the term "any immoral or indecent act" is so vague and indefinite that it fails to give to a person of ordinary intelligence fair notice of forbidden conduct.

We disagree. "It is a general principle of statutory law that a statute must be definite and certain in its provisions to be valid, and when it is so vague and indefinite that men of common intelligence must necessarily guess at its meaning and differ as to ist application, it violates the first essential of due process of law. *Hayes v. State,* 11 Ga. App. 371 (75 SE 523) [1912]." *City of Atlanta v. Southern Railway co.,* 213 Ga. 736, 738 (101 SE2d 707) (1958). The inclusion in a criminal statute of the term "indecent condition or act" has withstood prior assault. *Scarborough v. State,* 231 Ga. 7 (200 SE2d 115) (1973). The phrase "any immoral or indecent act" in conjunction with the requisite element of the offense that the act be committed "with the intent to arouse or satisfy

the sexual desires of either the child or the person" is sufficiently definite. "We find [the statute] to be definite and certain in its meaning. Men of common intelligence would not differ as to the application of its provisions." *Anderson v. Little & Davenport Funeral Home, Inc.*, 242 Ga. 751, 753 (251 SE2d 250) (1978).

McCord next contends that the State failed to prove venue and failed to prove that the offense was committed within four years of the return of the indictment. Venue may be proved by circumstantial evidence. *Loftin v. State,* 230 Ga. 92, 94 (195 SE2d 402) (1973). From the testimony that McCord's barn was in Douglas County, and that the acts complained of took place there, the jury reasonably could infer venue in Douglas County. Similarly, while the evidence does not contain a precise or an approximate date of the event, it showed that McCord's barn was built in 1977, which is of necessity within four years of the return of the indictment on November 18, 1980. These enumerations are without merit.

Finally, McCord contends that the trial court erred in refusing to give his requested charge that simple battery is a lesser included offense of child molestation.

The case of *State v. Stonaker,* 236 Ga. 1 (222 SE2d 354), cert. denied, 429 U.S. 833 (1976), while principally known for other precepts, arose upon a conviction of child molestation. The court of Appeals, in Division 3, found that the failure of the trial court to charge simple battery as a lesser included offense was error. *Stonaker v. State*, 134 Ga. App. 123 (213 SE2d 506) (1975). On certiorari, we held: "Under the facts of this case we hold that simple battery as defined in Chap. 26-13 of the Criminal Code of Georgia is not a lesser included crime included in the crime of child molestation as

defined in Chapter 26-20 (Sexual Offenses) of the Criminal Code of Georgia." *Stonaker,* supra, 236 Ga. at 2. The facts of *Stonaker* as set out in the Court of Appeals opinion are indistinguishable from those before us. This enumeration also is without merit.

**Judgment affirmed. All the Justices concur.**